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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 323

HUNT OIL COMPANY, *Petitioner*,

v.

FEDERAL POWER COMMISSION, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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No.

HUNT OIL COMPANY, *Petitioner*,

v.

FEDERAL POWER COMMISSION, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari be issued to review the judgment entered April 17, 1959 by the United States Court of Appeals for the Fifth Circuit (Cause No. 17,256) and the orders of the Federal Power Commission issued February 6, 1958 (in Docket No. G-14229), February 7, 1958 (in Docket No. G-14408) and April 2, 1958 (in Docket Nos. G-14229 and 14408). The judgment affirmed the Federal Power Commission's orders issued February 6, 1958, February 7, 1958 and April 2, 1958.

OPINION BELOW

The order of the Federal Power Commission (in the form of a letter) issued February 6, 1958 (R. pp. 217-219) is not yet reported. The order of the Federal Power Commission issued February 7, 1958 (R. pp. 219-222) is not yet reported. The order of the Federal Power Commission issued April 2, 1958 (R. pp. 244-248) is reported in 19 Federal Power Commission Reports 446 (Preliminary Print). The majority and dissenting opinions of the Court of Appeals are reported in 266 F. 2d at pages 232-233, 222-232[1] and are printed in Appendix A, pp. 1a-2a, 3a-22a.

JURISDICTION

The judgment of the Court of Appeals was entered April 17, 1959 (Appendix A, p. 23a). Rehearing was denied June 3, 1959 (R. p. 296). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act.

QUESTIONS PRESENTED

(1) Does compliance with the certificate and rate filing requirements of Sections 4 and 7 of the Natural Gas Act with respect to a specific sale of natural gas pursuant to a contract of limited duration automatically constitute an unlimited commitment of the gas reserves specifically not dedicated in the contract of sale?

(2) Does the granting of an application for a certificate of public convenience and necessity pursuant to

[1] The Court's majority and dissenting opinions in *Sun Oil Company* v. *Federal Power Commission*, a companion case, in which the Court's reasons for affirming the Federal Power Commission's orders in this proceeding are set forth.

Section 7 of the Natural Gas Act authorizing a sale described in the application which requests authority *only* to continue a sale pursuant to a contract of fixed and limited duration constitute a certificate of unlimited duration?

(3) Does a new gas sales contract relating to a new sale of gas from leases from which there has been a previously completed sale constitute a change in an expired contract filed as a rate schedule and applicable to the previous, completed sale from the same field?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the Fifth Amendment to the Constitution of the United States and Sections 4, 5, 7 and 19 of the Natural Gas Act, as amended, (15 U.S.C. §§ 717c, 717d, 717f, 717r), pertinent provisions of which are printed in Appendix B, pp. 24a-31a.

STATEMENT

Petitioner entered into a contract dated June 30, 1948 with Southern Natural Gas Company ("Southern") for the sale of gas produced from certain unitized leases in the Gwinville Field in Mississippi (R. pp. 40-68). The contract was for a term of ten years from the date of first delivery and under its terms expired June 30, 1958 (R. pp. 63, 198). In connection with the price provisions of the contract, the contract specifically provided:

> "In this connection, it is understood that by this agreement Seller is not dedicating to Buyer, or to Buyer's market outlet, any portion of Seller's gas reserves in the Gwinville Gas Field or any portion of the gas produced by Seller from its wells in said field, but that Seller is simply selling

and Buyer is purchasing the quantity of gas called for in this agreement on the terms specified in this agreement and for the price set out above; * * *" (R. p. 60).

After this Honorable Court held in *Phillips Petroleum Company* v. *Wisconsin*, 347 U.S. 672 (1954) the Natural Gas Act to be applicable to independent producers, Petitioner, on October 5, 1954, with jurisdictional reservations, filed the contract dated June 30, 1948, as then amended, as its rate schedule, pursuant to the requirements of Section 4(c) of the National Gas Act (R. pp. 30, 33, 40-68). On October 12, 1954, Petitioner filed an application for a certificate of public convenience and necessity with respect to the sale covered by the contract of June 30, 1948.[2] The application recited that on and since June 7, 1954 Petitioner had sold natural gas to Southern pursuant to the contract of June 30, 1948, incorporated the contract in the application by reference, and set forth that "* * * application is hereby made only for a Certificate of Public Convenience and Necessity authorizing Applicant [Petitioner herein] to sell natural gas in the circumstances above described * * *" (R. pp. 83, 85, 92, 122). The Respondent accepted the contract dated June 30, 1948 as Petitioner's F.P.C. Gas Rate Schedule No. 6 (R. pp. 147-151, 149). By an order issued February 7, 1956 (F.P.C. Docket No. G-4366), Respondent issued Petitioner a certificate of public convenience and necessity authorizing the sale of natural gas as described in the order and "* * * as more fully described in the application and exhibits in this proceeding" (R. pp. 154-161, 158).

[2] This application related to a number of sales of natural gas including the sale to Southern pursuant to the contract of June 30, 1948.

On December 23, 1957 Petitioner entered into a new contract with Southern for the sale of natural gas from the Gwinville Field, Mississippi (R. pp. 162-202). This contract was a term of twenty years from December 1, 1957 (R. p. 190).[3] On January 10, 1958 Petitioner filed an application for a certificate of public convenience and necessity pursuant to the contract dated December 23, 1957, and, in the alternative, requested the contract of December 23, 1957 be filed as a notice of change in Petitioner's F.P.C. Gas Rate Schedule No. 6, consisting of the contract of June 30, 1948 (R. pp. 203-215). In such application, Petitioner attached the contract dated December 23, 1957 and requested a certificate to make the sale pursuant to such contract (R. pp. 208, 210). In alternatively requesting that the new contract of December 23, 1957 be filed as a notice of change in the rate schedule comprising the contract of June 30, 1948, Petitioner did so without prejudice to the request in the application for a certificate and without waiving any rights of Petitioner with respect to that filing (R. p. 208). In its application for rehearing (discussed below), Petitioner alleged Respondent erred in not filing and accepting the contract of December 23, 1957 as an initial (new) rate schedule (R. p. 233).

By a letter order issued February 6, 1958, the first order reviewed by the Court of Appeals, the Commission *rejected* without notice or opportunity for hearing, the certificate application (R. pp. 217-219). Respondent accepted the contract of December

[3] As of the same date, Petitioner and Southern entered into a letter agreement contingent on the enactment of H.R. 8525, 85th Congress, 1st Session (R. pp. 197-202). H.R. 8525 was not enacted, and the contingencies became ineffective.

23, 1957 as a "notice of change" in the rate schedule comprising the contract of June 30, 1948, and by an order issued February 7, 1958 in F.P.C. Docket No. G-14408, the second order reviewed by the Court of Appeals, suspended the effectiveness of the filing until July 10, 1958, and ordered a hearing to determine whether the prices set forth therein were just and reasonable (R. pp. 217-218, 219-222). Petitioner filed a timely application for rehearing and reconsideration of the Commission's orders issued February 6, 1958 and February 7, 1958 (R. pp. 223-243). By an order issued April 2, 1958 Respondent denied the application (R. pp. 244-248; 19 F.P.C. Reports 446 [Preliminary Print]).

On May 27, 1958 Petitioner filed in the United States Court of Appeals for the Fifth Circuit a petiton to review the Respondent's orders issued February 6, 1958, February 7, 1958, and April 2, 1958 (R. pp. 1-24). After a hearing, the Court on April 17, 1959 affirmed the Respondent's orders (266 F. 2d 233 [Ad. Sheets]; R. pp. 249-250). The Court noted in its opinion that "In material respects the facts in this case are not different from those in *Sun Oil Company v. Federal Power Commission, supra.*" Further, the Court stated that "For the reasons assigned in the opinion in the Sun Oil opinion, the orders of the Federal Power Commission are AFFIRMED." (266 F. 2d 233 [Ad. Sheets]; R. p. 250). Judge Brown in his dissent agreed with the "implicit holding" of the majority that Respondent's jurisdiction over the initial contract of June 30, 1948 continued until its expiration. Judge Brown, however, stated: "But Hunt, like the others, was entitled to a new Certificate on the 'new' contract on and after the expiration date origi-

nally fixed in the initial contract. * * *" (226 F. 2d 233 [Ad. Sheets]; R. 250).

In its letter order issued February 6, 1958 the Commission stated that the certificate application with respect to the sale covered by Petitioner's contract dated December 23, 1957 duplicates the acreage covered by the certificate in Docket No. G-4366 (which authorized the sale pursuant to the contract of June 30, 1948) and no further authorization is required. As Respondent's second order of February 7, 1958 even purported to extend the contract of June 30, 1948, filed as a rate schedule, beyond its expiration date, Respondent, in effect, held that Petitioner's applying for a certificate to make the sale pursuant to the contract of June 30, 1948 and Respondent's granting of a certificate for that purpose constituted an unlimited dedication of Petitioner's gas reserves. The order issued February 7, 1958 also purports to eliminate the term of the contract of June 30, 1948, and to hold that the contract dated December 23, 1957 cannot be filed as a new rate schedule even after the expiration of the June 30, 1948 contract.

REASONS FOR GRANTING THE WRIT

I.

The Respondent's Orders Violate Section 7 of the Natural Gas Act

In one of the early decisions construing the effect of the passage of the Natural Gas Act on contracts of natural gas companies, the Circuit Court of Appeals for the Tenth Circuit in *Colorado Interstate Gas Co. v. F.P.C.*, 142 F. 2d 943, 954, held that "* * * The passage of the Act did not automatically overthrow the contracts into which these companies had previ-

ously entered. * * *"[4] This decision was affirmed by this Honorable Court in *Colorado Interstate Gas Co.* v. *F.P.C.* (1945), 324 U.S. 581. Thus, when the Natural Gas Act was held applicable to independent producers by this Court's decision in *Phillips Petroleum Company* v. *Wisconsin* (1954), 347 U.S. 672, Petitioner's contract dated June 30, 1948 was not "automatically overthrown" or extended beyond the term thereof. The Court of Appeals for the Tenth Circuit confirms this interpretation by its statement in *Cities Service Gas Co.* v. *F.P.C.*, 255 F. 2d 860, 864, *cert.* denied 3 L. ed. 2d 73 (Ad. Sheets) that the "* * * [Natural Gas] Act * * * abrogates *none* of the usual contract rights except for the reviewing powers granted the Commission upon hearing."[4] The term (duration) of a gas sales agreement is one of the usual provisions and conditions of the agreement and is a very important one. The Commission's orders purport to abrogate that term.

At the date of this Court's *Phillips* decision, *supra*, Petitioner had undertaken only to make the sale contemplated by the contract of June 30, 1948. The *contract terms* quoted above related only to the sale of quantities of gas for a fixed term and *specifically do not dedicate* acreage or leases. Under the law of contracts, that sale was completed on June 30, 1958, and the parties could, as they did, agree to a new contract. Under the plain language of Section 7(c) of the Natural Gas Act, an applicant for a certificate of public convenience and necessity initially proposing a sale subject to the jurisdiction of Respondent clearly has

[4] Emphasis indicated by italics is supplied unless otherwise indicated.

the right to propose the terms and conditions of that sale including the price and duration. This is made abundantly clear by this Court's recent decision in *Atlantic Refining Co.* v. *Public Serv. Comm.* ... U.S. ... (Nos. 518 and 536, October Term, 1958), 3 L. ed. 2d 1312, 1318 (Ad Sheets) by this Court's statement that "* * * Certainly the filing of the application for a certificate did not constitute a dedication to the interstate market of the gas recoverable under these leases. * * *" When a sale has been undertaken prior to the date the Natural Gas Act was construed as applicable to independent producers, it is also clear that Petitioner need only seek certificate authority to complete that sale.

As set forth in the Statement herein, Petitioner only sought in the initial certificate application authority to continue the sale undertaken by the contract of June 30, 1948. Under Section 7(e) of the Act, Respondent is required to issue a certificate "* * * authorizing the whole or any part of the * * * sale * * * covered by the application * * *" upon the applicant making the requisite statutory showings including ability to do the acts proposed. Except for the authority in that section to attach conditions, there is no provision in Section 7 of the Act which authorizes the Commission to amend or alter the proposal set forth in the certificate application. Respondent's order of February 7, 1956 issuing the certificate does not purport to extend the sale beyond the proposal in the application, namely the sale undertaken by the contract of June 30, 1948, and terminating on June 30, 1958, with the expiration of the contract (R. pp. 154-161, 158). As of the date Petitioner filed its initial certificate application, October 12, 1954, or as of the date of the final hearing

thereon, January 26, 1956.[5] Petitioner did not and could not show ability to continue the sale beyond June 30, 1958, the date the contract of June 30, 1948 expired by its own terms. The contract of December 23, 1957 was not then in existence, and Petitioner had no purchaser for gas produced after June 30, 1958.

Under the foregoing circumstances, Respondent's order issued February 6, 1958 is a holding that the filing of a certificate application to continue a sale pursuant to a contract of fixed and limited duration and in which there is no dedication of leases or gas reserves, and the granting of the application without conditions as to term, constitutes an unlimited commitment to the interstate market of the gas recoverable under the leases. Such holding clearly exceeds Respondent's authority as Respondent only has authority to issue the certificate for the term sought by Petitioner or to condition the grant on Petitioner's accepting a certificate of unlimited duration.

Respondent has attempted to justify its action throughout these proceedings on the premise that Petitioner must obtain Respondent's approval under Section 7(b) of the Act to cease deliveries pursuant to the contract of June 30, 1948. This Court's decision in *Atlantic Refining Co.* v. *Public Serv. Comm., supra.*, 3 L. ed. 2d 1312, 1319, (Ad Sheets) it is respectfully submitted, shows the fallacy of Respondent's contention. This decision pointed out that "* * * Section 7(e) vests in the Commission control over the conditions under which gas may be initially dedicated to interstate use. Moreover, once so *dedicated* there can

[5] Respondent's order issued February 7, 1956 shows the last hearnig date as "January 26, 1955", which obviously is a typographical error (R. 156).

be no withdrawal of *that* supply from continued interstate movement without Commission approval. * * *" The crucial question is what did Petitioner dedicate? As the contract of June 30, 1948 clearly discloses, Petitioner only agreed to sell specific volumes of gas for a fixed period. The contract specifically provided there is no dedication of gas reserves or gas. Petitioner's certificate application and the Commission's order of February 7, 1956 issuing the certificate did not purport in any way to vary *that* agreement. Such application and order merely sought and authorized certificate authority to fulfill the commitment to sell specific quantities of gas. Although Petitioner entered into, and filed, the contract dated December 23, 1957, prior to June 30, 1958, there can be no question that Petitioner fulfilled all of its obligations and commitments under the contract of June 30, 1948 as of June 30, 1958. Ceasing deliveries after that date could not be an abandonment. Respondent's order issued February 6, 1958 purports to extend the certificate authority indefinitely, and, in fact, Respondent's orders erroneously seek to extend the ten-year commitment in the contract of June 30, 1948 for the productive life of the leases involved.

II.

The Respondent's Orders Violate Section 4 of the Natural Gas Act

Petitioner filed the June 30, 1948 contract as its rate schedule pursuant to the requirements of Section 4(c) of the Natural Gas Act. The contract contained all the prices and terms of the sale contemplated thereby. One of the terms and conditions of the sale as set forth therein was that it be continued for ten years from the date of the initial delivery, or to June 30,

1958. As set forth in the preceding section, this Court's *Phillips* decision, *supra*, did not abrogate any terms of this contract. The filing of the contract as a rate schedule did not alter in any way the terms of the contract. This Court stated in *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332, 342, 343 that the rate filing "* * * requirements [of the Natural Gas Act] are no more than are necessary to implement §§ 4(e) and 5(a); the filing requirements are obviously necessary to permit the Commission to exercise its review functions * * *" and, in short, the Act "* * * provides only for *notice* to the Commission of the rates established by natural gas companies and for *review* by the Commission of those rates. * * *" (Emphasis not added). While the foregoing statements related to the rate terms of sales contracts filed as rate schedules, the statements would also appear applicable to other contract provisions, including the term (duration) of the contract. Respondent took no action with respect to the term of the contract as a rate schedule during the effective term thereof. The order of February 7, 1958 only suspended the effectiveness of the new contract of December 23, 1957. Thus, the contract of June 30, 1948 as such, and as a rate schedule, in any event, expired and had no force and effect after June 30, 1958. After a contract becomes effective as a rate schedule, Respondent's only authority to change the provisions thereof is Section 5(a) of the Act. The record is clear that Respondent did not purport to take any action under Section 5(a) with respect to the provisions of the contract. Additionally, as set forth in the preceding section hereof, Respondent did not purport to condition Petitioner's certificate to continuing the deliveries beyond the date the contract expired.

Under Respondent's holding that the contract rate schedule of December 23, 1957 is a change in the contract rate schedule of June 30, 1948, and that the contract even as a change could have no effectiveness until July 10, 1958, after the June 30, 1948 contract had expired, Respondent has decided either that the filing of the June 30, 1948 contract as a rate schedule automatically extends the term of the contract, contrary to this Court's decision in the *Mobile* case, *supra*, or Respondent has purported to extend the term thereof, which it cannot do without according Petitioner a hearing and making the requisite statutory findings, supported by substantial evidence. Respondent did not take this action.

The Court of Appeals in sustaining Respondent's orders appears to have adopted the theory that the filing of the contract as a rate schedule continued its effectiveness, as it held in the *Sun Oil Company* opinion, *supra*, that " * * * upon the *termination* of a contract fixing a rate which was the subject of an initial rate filing with the Commission, a new contract is made between the same parties for the same service as was provided by the terminated contract but at a higher rate, the new rate is a rate change * * *." (266 F. 2d at 225). Neither the contract of June 30, 1948, nor the contract of December 23, 1957 provided for a service. They provided for the sale and delivery of quantities of gas for specified periods (R. pp. 41, 60, 165). The Court of Appeals for the Fifth Circuit pointed out in *Gulf Oil Corporation* v. *F.P.C.*, 255 F. 2d 556, 557 that " * * * producers are in reality selling gas which they own and are not, in the traditional sense, primarily furnishing a service to the public." In his dissent, in the *Sun Oil Company* case, *supra*,

Judge Brown stated: "As these producers are not engaged in transportation, the sole basis for jurisdiction is the *sale* for resale. * * * " (266 F. 2d at 228, emphasis not added). To hold under the circumstances that the December 23, 1957 contract results in a change in the June 30, 1948 contract after its expiration date as a contract or as a rate schedule, is, we respectfully submit, an erroneous interpretation of Section 4 of the Act and one which clearly contravenes this Court's holding as to the effect of filing contracts as rate schedules.

III.

Respondent's Orders Deprive Petitioner of Property Rights Without Due Process of Law

Petitioner's leases in the Gwinville Field constitute valuable property rights. This Court's decision in *Phillips Petroleum Company* v. *Wisconsin*, 347 U.S. 672, at most subjected these leases to Respondent's regulatory authority *only* to the extent Petitioner had undertaken to sell natural gas for resale in interstate commerce therefrom as of the date of that decision. As of that date, Petitioner retained all other rights to make disposition of additional gas from such leases, subject to Respondent's regulatory authority with respect to any future sales for resale in interstate commerce. Under the most adverse interpretation of Petitioner's commitment of its contract dated June 30, 1948, Petitioner was at liberty after June 30, 1958 to propose a new sale and to refuse a certificate which conditioned that sale. Cf. *Atlantic Refining Co.* v. *Public Serv. Comm., supra.* When, however, Petitioner proposed its second sale, Respondent, without notice and opportunity for hearing, in effect,

ordered Petitioner to continue the sale without limitation as to duration to Southern.

In addition to the substantial monetary loss Petitioner will sustain by Respondent's unauthorized action, Petitioner is denied the property right to propose, at least after June 30, 1958, the new sale negotiated by Petitioner, and to refuse to make the sale on terms which the Commission may impose in a certificate proceeding under Section 7 of the Natural Gas Act. Petitioner respectfully submits that this Court decided in *United Gas Pipe Line Company* v. *Mobile Gas Service Corp., supra, and Atlantic Refining Co.* v. *Public Serv. Comm., supra*, that Petitioner has those rights. Additionally, Respondent has in effect held that all of Petitioner's gas from leases in the Gwinville Field has been committed to a sale to Southern without limitation, under the contract of June 30, 1948, contrary to the holdings of this Court in the foregoing decisions, Petitioner's contracts with Southern, and all filings Petitioner has made with Respondent.

IV.

This Appeal Involves Important Legal and Other Considerations

The questions presented are important in the administration of the Natural Gas Act and in providing at stable prices future sources of gas for ultimate public consumption. It has been the practice of producers of natural gas to sell gas pursuant to contracts of fixed duration. The duration of the sale has been an important consideration in fixing other terms of gas sales contracts, including price provisions. This practice has permitted, at least after the fixed period, a new sale in accordance with the economic conditions

prevailing at the date of the new sale. The importance of the stabilizing effect of contractual arrangements in the regulatoary scheme of the Natural Gas Act was noted by this Court in its *Mobile* decision, *supra*: "By preserving the integrity of contracts, it permits the stability of supply arrangements which all agree is essential to the health of the natural gas industry." (350 U.S. at 344).

If the terms of gas sales contracts are finally held ineffective, as Respondent has held in this proceeding, then Petitioner has the right, as this Court held in its *Mobile* decision, *supra*, to make *ex parte* rate filings with respect to new sources of gas under which Petitioner can "at will" file notices of changes in its rate schedules (350 U.S. at. 343). Clearly, the widespread use of *ex parte*, rate filings, in lieu of contracts of fixed duration, would have a material bearing on the stabilizing effect of fixed duration contracts and would raise new issues in determining the economic feasibility of pipeline proposals. According to Respondent's Thirty-fifth Annual Report, there were some 6,897 independent producer sale schedules in effect on June 7, 1954, the date of this Court's decision in *Phillips Petroleum Company v. Wisconsin*, 347 U.S. 672. Rate filings were made by some 2,141 independent producers during Respondent's fiscal year ending June 30, 1955 (Pp. 108-109). Petitioner believes, based on its general knowledge of the practices throughout the natural gas industry, that a very high percentage of these rate filings consists of contracts of fixed duration. Thus, the questions presented by this petition are important in the administration of the Natural Gas Act.

Judge Brown noted in his dissent that it is implicit in the Court of Appeals' opinion that that Court is apprehensive that administrative regulation will be thwarted if the parties can prescribe the term (i.e., quantity) of the contract (266 F. 2d at 231). Judge Brown points out three reasons why the Court should not be apprehensive in this regard. Additionally, it seems appropriate to point out that in certifying pipeline construction in which the adequacy of the gas supply has been an issue, the Commission's basic consideration has been the estimated volumes of gas committed to the project during the terms of the gas purchase agreements. Hence, it is apparent that gas reserves which have not been committed beyond the terms of sales contracts have had little if any, effect to date on the availability of adequate gas reserves to justify the certification of pipeline projects.

CONCLUSIONS

Respondent's orders issued February 6, 1958, February 7, 1958 and April 2, 1958 exceed Respondent's authority under Sections 4 and 7 of the Natural Gas Act, and deprive Petitioner of his Constitutional and property rights without due process of law. The orders will have a far-reaching effect, and in Petitioner's view, an adverse effect, in the administration of the Natural Gas Act and in making available to the ultimate consumer new sources of natural gas without the stabilizing effect of contracts of fixed duration.

Accordingly, pursuant to Section 19(b) of the Natural Gas Act and Paragraph 1(b) of Rule 19 of the Rules of this Court, Petitioner prays that a writ of certiorari be granted.

Respectfully submitted,

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Certificate of Service

I certify that the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit was served upon Respondent, the Federal Power Commission, by mailing a copy thereof, postage prepaid, to each of the following attorneys for Respondent on the 19th day of August, 1959:

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 17256

HUNT OIL COMPANY,

Petitioner,

VERSUS

FEDERAL POWER COMMISSION,

Respondent.

Petition for Review of Orders of the Federal Power Commission.

(April 17, 1959.)

Before TUTTLE, JONES and BROWN, Circuit Judges.

JONES, Circuit Judge: This is a companion case to the four cases decided today which are styled *Sun Oil Company* v. *Federal Power Commission, No. 17040; Humble Oil & Refining Company* v. *Federal Power Commission, No. 17128; Magnolia Petroleum Company* v. *Federal Power Commission, No. 17136;* and *S. W. Richardson* v. *Federal Power Commission, No. 17049.*

In material respects the fact in this case are not different from those in *Sun Oil Company* v. *Federal Power Commission, supra.* In the *Sun Oil Company* case a new contract for supplying natural gas became effective upon the expiration of an earlier contract. Here a contract was cancelled before its expiration date and superseded by a subsequent agreement fixing a higher rate. The princi-

ples announced in the *Sun Oil Company* case are, a *fortiori*, applicable in this case. For the reasons assigned in the opinion in the *Sun Oil* opinion, the orders of the Federal Power Commission are

AFFIRMED.

BROWN, Circuit Judge, dissenting:

For dissenting opinion see *Sun Oil Company* v. *FPC*, 5 Cir., 1959, ... F. 2d ..... [No. 17040; printed in slip opinion jointly as the separate dissent in each of cases Nos. 17040, 17049, 17128, 17136, 17256].

To that I would add the following:

I agree with the Court's implicit holding that Hunt did not have the right to terminate existing jurisdiction and power of the Federal Power Commission to regulate the initial contract by the agreed cancellation prior to its expiration date. But Hunt, like the others, was entitled to a new Certificate on the "new" contract on and after the expiration date originally fixed in the initial contract. To this denial my dissent, therefore, applies with equal force.

A true copy

Test: [s] EDWARD W. WADSWORTH
Edward W. Wadsworth
Clerk, U. S. Court of Appeals, Fifth Circuit
New Orleans, Louisiana
Aug. 3, 1959

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 17040

SUN OIL COMPANY,

Petitioner,

VERSUS

FEDERAL POWER COMMISSION,

Respondent.

Petition for Review of Orders of the Federal Power Commission.

(April 17, 1959.)

Before TUTTLE, JONES and BROWN, Circuit Judges.

JONES, Circuit Judge: Sun Oil Company, herein called Sun, made a contract bearing date August 26, 1947, with Southern Natural Gas Company, herein referred to as Southern, for the sale to the latter of natural gas to be produced by Sun from the Gwinville Field in Mississippi. The contract provided that it should be in effect for ten years commencing on the date of the first delivery of gas by Sun to Southern. This date was September 3, 1947. The contract provisions as to price were in these terms:

> "Subject to the provisions of Article VI hereof, providing for a possible adjustment in price, Buyer agrees to pay Seller for all gas purchased hereunder a price
>
> (1) of seven and one-half cents (7½¢) for each one thousand (1,000) cubic feet of gas during the first five (5) years of the term hereof;

(2) of eight cents (8¢) for each one thousand (1,000) cubic feet of gas during the second five (5) years of said term."

Immediately following the foregoing was this proviso:

"In this connection, it is understood that by this agreement Seller is not dedicating to Buyer, or to Buyer's market outlet, any portion of Seller's gas reserves in the Gwinville Gas Field or any portion of the gas produced by Seller from its wells in said field, but that Seller is simply selling and Buyer is purchasing the quantity of gas called for in this agreement on the terms specified in this agreement and for the price set out above; * * *."

Subsequent to the *Phillips Petroleum* case,[1] decided on June 7, 1954, the Federal Power Commission supplemented the provisions of the Natural Gas Act, 15 U. S. C. A. § 717 *et seq.*, by issuing its so-called No. 174 series of orders[2] which required independent producers of natural gas to file rate schedules and apply for certificates of public convenience and necessity. Sun applied for and procured a certificate of public convenience and necessity authorizing the sale of natural gas to Southern. It filed the contract as a rate schedule under Section 4 of the Natural Gas Act.[3]

Prior to the termination of their agreement Sun and Southern made a new agreement in 1957 which was to become effective upon the expiration of the 1947 agreement. This provided for continued deliveries of gas in the same field and with the same facilities. The contract was, for the most part, substantially the same as that which it succeeded. The primary difference was an increase from

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[1] *Phillips Petroleum Company* v. *Wisconsin*, 347 U. S. 672, 74 S. Ct. 794, 98 L. Ed. 1035, 3 P U R 3d 129.

[2] 18 C F R §§ 154.91-154.102, §§ 157.23-157.31.

[3] 15 U. S. C. A. § 717 c.

8¢ per Mcf to 20¢ per Mcf of gas. Sun then applied, under the new contract, for a new certificate of public convenience and necessity and filed the new contract as as initial rate schedule. The Commission rejected the application and filing on the ground that, the same service being involved, any new certificate would merely duplicate the earlier certificate which was still effective and outstanding and the proposed rate filings were of rate changes rather than initial rate filings. Protesting the Commission's order and reserving its right to contest it, Sun resubmitted the 1957 contract as a rate change. The Commission then, as is authorized by Section 4 of the Act, suspended the effectiveness of the rate change for the statutory period of five months. At the expiration of the five-month period, the 20¢ rate was placed in effect and Sun undertook to make such refunds as might be required. Sun has petitioned this Court to review the order of the Commission rejecting the application for a certificate and an initial rate filing, and the order suspending the rate change. Although a number of specifications of error are made, most of them are hinged upon the proposition that the rate set forth in the new contract was an initial rate filing, and the collateral doctrine that the certificate of public convenience and necessity which was originally issued had expired and become *functus officio* upon the date fixed for the expiration of the first contract by its terms.

It is "rates and charges" that are subject to regulation.[4] The method of filing and regulating rates has thus been succinctly stated.

> "The act requires natural gas companies to file all rates and contracts with the Commission (§ 4(c)) and authorizes the Commission to modify any rate or contract which it determines to be 'unjust, unreasonable, unduly discriminatory or preferential' (§ 5(a)). Changes to previously filed rates or contracts must

[4] Natural Gas Act § 4(a), 15 U. S. C. A. § 717c (a).

be filed with the Commission at least 30 days before they are to go into effect (§ 4(d)), and, except in the case of industrial rates, the Commission may suspend the operation of a new rate pending a determination of its reasonableness. (§ 4(e)). If a decision has not been reached before the period of suspension expires, a maximum of five months, the filed rate must be allowed to go into effect, but the Commission's order may be made retroactive to that date." *United Gas Pipe Line Company* v. *Mobile Gas Service Corporation*, 350 U. S. 332, 76 S. Ct. 373, 100 L. Ed. 373, 12 P U R 3d 112.

In the *Mobile* case United was obligated by contract to furnish gas to Mobile at a fixed rate during the contract period of ten years. There was no provision for any different rate nor was there any provision made for changing the rate during the contract term. United undertook to effect a rate increase by filing a new rate schedule with the Commission. It was held that the Natural Gas Act gave no power to put unilateral rate increases into effect, and that United could procure a rate increase, if at all, only by an order of the Commission entered in a proceeding under Section 5 of the Act.

It is urged that the decision in Mobile recognizes a freedom of contract in rate making applicable alike to new contracts and to renewal contracts. The "philosophy of Mobile", as it is referred to, is such as to require, it is contended, a holding that when a contract has, by the law of contracts, terminated, the parties are permitted to fix rates for the continued service, free from Section 4 regulation, in the same manner that might have been done before the passage of the Act. We do not think the doctrine of Mobile applies in a situation such as is before us here. In *United Gas Pipe Line Co.* v. *Memphis Light, Gas & Water Division*, 358 U. S. 103, 79 S. Ct. , 3 L. Ed. 2d 153, reh. den. 358 U. S. 942, S. Ct. , 3 L. Ed. 2d 350, it was held that Section 4 procedures were available where rate increases were proposed pursuant

to a "going rate" provision in the contract. The purpose of Congress was carried out in framing its regulatory scheme "not only by preserving the 'integrity' of private contractual arrangements for the supply of natural gas, * * * (subject of course to any overriding authority of the Commission), but also by providing in Section 4 for the earliest effectuation of contractually authorized or otherwise permissible rate changes consistent with appropriate review." 358 U. S. 114.

The same doctrine has been applied where the contract contained a "favored nation" clause and it has been held that rate increases under such a clause are subject to Section 4 of the Act. *Mississippi Power & Light Co.* v. *Memphis Natural Gas Co.*, 5th Cir. 1947, 162 F. 2d 388, 71 P U R N S 182, cert. den. 332 U. S. 770, 68 S. Ct. 82, 92 L. Ed. 355. So too it has been held that rate increases pursuant to the escalator clause of a contract which predated the *Phillips* decision of June 7, 1954, were rate changes subject to Section 4 of the Act and not initial rates subject to Commission review only under Section 5 of the Act. *Bel Oil Corporation* v. *Federal Power Commission*, 5th Cir. 1958, 255 F. 2d 548, 24 P U R 3d 512, cert. den. 358 U. S. 804, S. Ct. , 3 L. Ed. 2d 76. It necessarily follows that where, upon the termination of a contract fixing a rate which was the subject of an initial rate filing with the Commission, a new contract is made between the same parties for the same service as was provided by the terminated contract but at a higher rate, the new rate is a rate change and subject to the provisions of Section 4 of the Act, including the provisions relating to the suspension of the rate. The rate fixed by the new contract is not an initial rate which could be changed only by order of the Commission in a proceeding under Section 5.

The foregoing disposes of the principal question presented. Other questions remain. The Petitioner contends that since its certificate originally issued authorized

the sale by it of natural gas "as more fully described in the application and exhibits", and since the certificate was issued under an order providing that the certificate "shall be effective only so long as the Applicant continues the acts or operations hereby authorized," it must follow that the certificate expired with the contract and the rejection by the Commission of the application for a new certificate was invalid. This contention is based upon a misconception of the purpose and effect of the certificate. The authorization of the certificate is not only for the sale of gas pursuant to the contract but pursuant to and subject to the provisions of the Act and regulation pursuant thereto by the Commission. The Commission has the power under Sections 7(e) and 7(e) of the Act, 15 U. S. C. A. § 717f(e), (e), to issue certificate of public convenience and necessity of limited duration. *Sunray Mid-Continent Oil Co.* v. *Federal Power Commission*, 353 U. S. 944, 77 S. Ct. 792, 1 L. Ed. 2d 794, 18 P U R 3d 320. Whether, in this case, the Commission could have granted a certificate limited to the life of the contract, without abusing its discretion, need not be decided. We find nothing to show any intent of the Petitioner to apply for a limited or conditional certificate, nor do we find anything to indicate that the Commission intended to limit its certificate. The matters to which the Petitioner points do not permit of the inference which it would have us draw.

The Petitioner asserts that because of the rejection of the application for a second certificate without a hearing after notice there was a violation of the administrative requirement of Section 7(e) of the Act, 15 U. S. C. A. § 717f(e). The Petitioner makes a like contention with respect to the rejection of its second contract as an initial rate filing. Where, as in this case, there could be no right to have a certificate of public convenience and necessity issued which duplicated a certificate outstanding and operative; and where, as here, the second contract was a nullity as an initial rate filing, it was proper to reject them

without notice and without a hearing. *Cf. United Gas Pipe Line Co. v. Mobile Gas Service Corporation, supra.*

The Commission suggests that the orders which Sun brings before us for review are interlocutory and that administrative remedies have not been exhausted. To support this view reliance is placed upon *Shank, Trustee, v. Federal Power Commission*, 5th Cir. 1956, 236 F. 2d 830, 15 P U R 3d 408, cert. den. 352 U. S. 970, 77 S. Ct. 361, 1 L. Ed. 2d 324, and *Lee, Trustee, v. Federal Power Commission*, 5th Cir. 1956, 236 F 2d 835, cert. den. 352 U. S. 970, 77 S. Ct. 361, 1 L. Ed. 2d 323. In the cited cases the orders were mere procedural steps in the administrative process. The orders which we here review are "of a definitive character dealing with the merits of a proceeding before the Commission and, as such, are reviewable under Section 19(b) of the Act, 15 U. S. C. A. 717r(b). *Federal Power Commission v. Metropolitan Edison Co.*, 304 U. S. 375, 58 S. Ct. 963, 82 L. Ed. 1408, 24 P U R N S 394; *Magnolia Petroleum Co. v. Federal Power Commission*, 5th Cir. 1956, 236 F. 2d 785, 15 P U R 3d 364, cert. den. 352 U. S. 968, 77 S. Ct. 356, 1 L. Ed. 2d 322. We see no need for the holding of a formal hearing and the taking of testimony where no fact issue was presented. Although the orders before us are, in a sense, procedural and interlocutory, they make a final disposition of questions of grave importance in the natural gas industry. The orders were formal determinations of rights of the petitioners and the effect of the orders was not contingent upon future administrative action. We have no doubt that these orders should be passed upon by this Court.

Sun urges that its contractual relationship with Southern is only for the sale of natural gas; that it engages in no service and renders no service, that it does not propose to abandon any facilities, that it has no facilities subject to the Commission's jurisdiction and hence it is not subject to Section 7(b) of the Act, 15 U. S. C. A. 717f(b). Our decision in *Continental Oil Company v.*

Federal Power Commission, F. 2d , decided this day, is controlling on this issue. A like contention was made before the Court of Appeals for the Third Circuit and its well reasoned conclusions are contrary to the position urged by Sun. *J. M. Huber Corporation* v. *Federal Power Commission,* 3rd Cir. 1956, 236 F. 2d 550, 15 P U R 3d 434, cert. den. 352 U. S. 971, 77 S. Ct. 363, 1 L. Ed. 2d 324. The principles there announced are sound and are applicable here. The decision of this Court in *Deep South Oil Company of Texas* v. *Federal Power Commission,* 5th Cir. 1957, 247 F. 2d 882, 20 P U R 3d 469, is not in conflict.

It follows that the Commission's orders should be and hereby are

AFFIRMED

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17040

SUN OIL COMPANY, *Petitioner*,

VERSUS

FEDERAL POWER COMMISSION, *Respondent*.

No. 17049

S. W. RICHARDSON, *Petitioner*

VERSUS

FEDERAL POWER COMMISSION, *Respondent*.

No. 17128

HUMBLE OIL & REFINING COMPANY, *Petitioner*,

VERSUS

FEDERAL POWER COMMISSION, *Respondent*.

No. 17136

MAGNOLIA PETROLEUM COMPANY, *Petitioner*,

VERSUS

FEDERAL POWER COMMISSION, *Respondent*.

No. 17256

HUNT OIL COMPANY, *Petitioner*

VERSUS

FEDERAL POWER COMMISSION, *Respondent*.

PETITIONS FOR REVIEW OF ORDERS OF THE FEDERAL POWER COMMISSION.

Before TUTTLE, JONES and BROWN, Circuit Judges.

BROWN, Circuit Judge, dissenting:

I am in full agreement with the Court that the orders are reviewable. I also accept, as binding on me, our prior decision in *Bel Oil Corp.* v. *FPC*, 5 Cir., 1958, 255

F. 2d 548, cert. denied 358 U. S. 804, S. Ct. , 3 L. Ed. 2d 76, holding that an automatic stepped-up escalator increase is a change of rate. I do that even though that decision was based primarily on our earlier one of *Mississippi Power & Light Co.* v. *Memphis Natural Gas Co.*, 5 Cir., 1947, 162 F. 2d 388, cert. denied 332 U. S. 770, 68 S. Ct. 82, 92 L. Ed. 355, which in turn was pronounced in the pre-*Mobile* era when all thought that contracts of a natural gas company, as in the case of any other public utility, were subject to an overriding public regulation. *Mobile* accorded almost absolute sanctity to the private contract and rejected, without so much as a deferential footnote citation, the traditional and contrary concept of which *Union Dry Goods Co.* v. *Georgia Public Service Corp.*, 1919, 248 U. S. 372, 39 S. Ct. 117, 63 L. Ed. 309, was the symbol as well as the *cause celebre* around which the controversy raged before the Commission and the Third Circuit. 215 F. 2d 883, 886.

But in the face of *Mobile* and what it teaches, I think the Court's substantive action affirming the Commission disregards the limited nature of the jurisdiction of the Federal Power Commission, ignores the special and decisive relevance of contract terms, and does all of this without a hearing. I cannot acquiesce in this and must therefore, with deference, dissent.

I.

At the outset I think it well to point out that in reality there is but one basic question. To split it up into apparently separate issues concerning the scope of the Certificate, the change of rate in the contract, or potential abandonment of service "facilities" really only confuses. That is so because these essentially beg the question. For example, if the new contract and its new price is a change of rate, then obviously, it is not an initial rate and it must be filed under Section 4(d) subject to supervision and rebate. If the "sale" is something apart from the

contract which alone brought it about, so that it must continue after the contract has completely expired by its own terms, then no new Certificate is required, the original one is sufficient, and the new application should be denied. On the other hand, if the power of the Commission over the producer is limited to the "sale" reflected by the contract, then the grant of authority expired with the sales contract, so that a new Certificate would be required since all agree it is illegal to sell or transport or render service without a Certificate. Likewise, on that assumption, the old having expired, all there is is now new, and the new contract would be an initial rate subject only to § 5 review and not to § 4 interim suspension and rebate.

Each of these things results depending on the basic decision. But none is really a reason *why*.

I submit that a careful reading of the Court's opinion reflects that it finds no real reasons, and in the final analysis what it does, as it has done in *Continental Oil Co.* v. *FPC*, 5 Cir., 1959, F. 2d [No. 17016], this day decided, is to arrive at its decision out of the conscientious belief that regulation is otherwise ineffectual. I would be the first to think that we could legislate interstitially, but that hardly includes engraftment or transplanting of a congenitally missing organ. If the supposed adverse results apprehended would occur, which I doubt, then Congress, not this Court, should be the surgeon.

II.

The Court, after pointing out that we have held that during the life of an *existing contract*, an increase in price from the operation of a most-favored-nation's clause and from an automatic stepped-up escalation clause are rate changes subject to § 4 review, then sets forth as its sole reason which "disposes of the principal question presented" this language:

> "It necessarily follows that where, upon the *termination* of a *contract* fixing a rate which was the sub-

ject of an initial rate filing with the Commission, a *new contract* between the same parties for the same service as was provided by the terminated contract but at a higher rate, the new rate is a rate change and subject to the provisions of Section 4 of the Act, including the provisions relating to the suspension of the rate. The rate fixed by the *new contract* is not an initial rate which could be changed only by order of the Commission in a proceeding under Section 5." (emphasis supplied)

Except for the imprimatur of this Court which states that it is *law*, I do not at all think it follows, either normally or naturally or *necessarily*, that "upon the *termination* of a contract" a "*new* contract between the same parties" is a rate change. To reason from *existing* contracts to entirely *new* ones after termination is a non sequitur flying in the face of *Mobile*.

The jurisdiction of the Commission is limited. The act at one end excludes all that is encompassed within production and gathering and, at the other end, the distribution and sale of it to the local consumer. § 1(b). It does not undertake to regulate the "business" of natural gas. "Three things and three things only Congress drew within its own regulatory power delegated by the Act to its agent, the Federal Power Commission. These were: (1) the transportation of natural gas in interstate commerce; (2) its sale in interstate commerce for resale; and (3) natural gas companies engaged in such transportation or sale. * * *." *FPC* v. *Panhandle Eastern Pipe Line Co.*, 1949, 337 U. S. 498, 503, 69 S. Ct. 1251, 93 L. Ed. 1499.

As these producers are not engaged in transportation, the sole basis for jurisdiction is the *sale* for resale. For "until there is a sale of the natural gas produced by such operations and installations in interstate commerce for resale, they are exempt. In the event of such sale the jurisdiction of the Commission applies but only because

of the sale and only to the extent that the Natural Gas Act confers jurisdiction." *Saturn Oil & Gas Co.* v. *FPC*, 10 Cir., 1957, 250 F. 2d 61, cert. denied 355 U. S. 956, 78 S. Ct. 542, 2 L. Ed. 2d 532.

The *sale* is therefore vital. It is the alpha. Can this Court be right by holding that there is no omega?

This is important especially in view of the cyclonic case by case development under the Act subjecting the owner of a gas well to the awesome obligations of an orthodox utility despite the obvious "* * * fact that procedures are in reality selling gas which they own and are not, in the traditional sense, primarily furnishing a service to the public." *Gulf Oil Corp.* v. *FPC*, 5 Cir., 1958, 255 F. 2d 556.

Local distributors cannot get natural gas without transmission lines. Transmission companies cannot obtain the needed astronomical financing unless the entrepreneurs have long-term commitments by distributors to take, and by producers to supply, the gas. Despite the fact that the long-term supply contract must deal with unknown economic factors of a kind which would ordinarily permit a commodity owner to provide an ascertainable but adjustable formula to determine price, we have held that such agreed adjustments are rate changes. *Bel Oil Corp.* v. *FPC*, 5 Cir., 1958, 255 F. 2d 548. When such increase or "rate changes" are sought, the producer must satisfy the standards prescribed by the Commission to determine whether the rate will be "just and reasonable." § 4(a). *Forest Oil Co.* v. *FPC*, 5 Cir., 1959, ___ F. 2d ___ [No. 16844]. To whatever extent any part of the producer's physical equipment serves to effectuate the sale or contain the gas at the point of sale delivery, it becomes a "facility" prohibiting abandonment of any "service" performed thereby. *Continental Oil Co.* v. *FPC*, 5 Cir., 1959, ___ F. 2d ___ [No. 17016].

I do not believe that Congress ever intended that the moment the first cubic centimeter of gas started its irrepressible journey from the bowels of the earth to a Brooklyn burner tip, the gas well owner had committed himself and his commodity irrevocably either to the purchaser or to the life and death regulatory power of a remote agency.

III.

How was this likelihood to be avoided? Herein lies the explanation for stating the *grant* of power, and hence its *limitation*, in terms of *sale*. Power was not prescribed, as it might have been, in terms of "service," or the "furnishing," or the "supplying" of gas. What was required was a *sale*. This was a term having both an industry-gas-business relevance and a meaning readily understood by Congress. Despite the awkwardness which arises from the *Phillips* retrospective infusion of a general Congressional purpose to regulate sale by producers which the Commission and others for sixteen years thought to be nonexistent, this was as though Congress spelled out this policy: a producer need not sell for resale in interstate commerce; if he makes a sale, he will, for the duration of that sale, be subject to public utility regulation; when that sale is completed, he will then have the opportunity to reassess his position and determine whether he will cease production, sell in intrastate commerce, or make a new sale for resale in interstate commerce. In this way there was some practical adjustment of the conceptual difficulties involved in subjecting, for the first time in the nation's history, the owner of an exhaustible natural resource to a limited regulation.

IV.

I would quickly emphasize that I do not think that stating Commission jurisdiction in terms of *sale* inevitably ties jurisdiction to all of the refinements of the law of sales. But if, as this Court concludes—erroneously I think

—that Congress used "production" in its everyday sense, *Continental Oil Corp.* v. *FPC*, 5 Cir., 1959, F. 2d , [No. 17016], then it is an understatement to say that it certainly must have had in mind the usual connotations of a word and term so well understood and so much used as "sale." In this light, it meant at least a relationship growing out of a contract. "'[S]ale' is a word of precise legal import, both at law and in equity. It means, at all times, a contract between parties, to give and to pass rights of property for money—which the buyer pays or promises to pay the seller for the thing bought and sold." *Williamson* v. *Berry*, 1850, 49 U. S. (8 How.) 495, 544, 12 L. Ed. 1170. *Curtis* v. *O'Leary*, 8 Cir., 1942, 131 F. 2d 240; 77 CJS, Sales, § 1, at 575 (1952).

There are four main elements to a sale, which is to say a contract, express or implied, of sale: (1) a seller and a buyer; (2) a commodity or service; (3) a price or consideration; and (4) a quantity or time. We know for certain that the Commission cannot order an involuntary sale by a producer to a pipe line, so element (1) is fixed by the parties. The gas producer is unlike the traditional public utility whose holding out binds him to serve all on common terms. Element (2) is confined to gas with the possible expansion into the area of a service facility. We likewise know for an absolute certainty from *Mobile*, that the Commission cannot prescribe the price. This, too, is left to the parties subject only to a right to review by a hearing and on evidence under § 5. That takes care of element (3). On what basis, other than the insupportable one of judicial-administrative necessity can the Commission prescribe element (4)—that is, the *amount* of the commodity to be sold, whether expressed in terms of total quantity, or quantities for a stated term?

If the *amount* of the commodity, element (4), is thought of in terms of the *quantity* to be delivered, we know for a certainty that the Commission could not order a producer to deliver *more gas* than contracted for. This is

so because, whatever else may be the vagaries of the § 1(b) production and gathering exclusion, the Commission lacks power to order more production. It could not, for example, compel a producer to rework a sickly well, explore a new horizon, attempt to exploit and tap a new reservoir, much less drill an additional well in order to permit, under state conservation laws, an increase in allowable production and hence deliveries to the pipe line purchaser. This prohibition is so far-reaching that the Commission even lacks the power to order an increase in *transportation* facilities because this would indirectly compel an increase in production. *Panhandle Eastern Pipe Line Co.* v. *FPC*, 3 Cir., 1953, 204 F. 2d 675. See also *FPC* v. *Panhandle Eastern Pipe Line Co.*, 1949, 337 U. S. 498, 504-505, 69 S. Ct. 1257, 93 L. Ed. 1499; *Colorado Interstate Gas Co.* v. *FPC*, 1945, 324 U. S. 581, 598, 65 S. Ct. 829, 89 L. Ed. 1206; *FPC* v. *Hope Natural Gas Co.*, 1944, 320 U. S. 591, 612-615, 64 S. Ct. 281, 88 L. Ed. 333; *Phillips Petroleum Co.* v. *Wisconsin*, 1954, 347 U. S. 672, 678, 74 S. Ct. 794, 98 L. Ed. 1035; *Interstate Natural Gas Co.* v. *FPC*, 1947, 331 U. S. 682, 690, 67 S. Ct. 1482, 91 L. Ed. 1742.

Of course if the Commission cannot compel an increase in quantity deliverable under a contract, it may not do so by enlarging the period of *time* during which such deliveries are to be made. The result is the same. The impact is the same. In each case the Commission's order would be ineffectual unless *more* gas were produced, and this is forbidden territory to the Commission.

V.

The Supreme Court makes two things clear. First, private contracts underlie the whole scheme of regulation. Second, such private contracts give way only by determination of the Commission made after notice, hearing and order. This basic approach pervades all said and done in *Mobile*.

"The Natural Gas Act * * * recognizes the need for private contracts of varying terms and expressly provides for the filing of such contracts as a part of the rate schedules. * * * By preserving the integrity of contracts, it [the Act] permits the stability of supply arrangements which all agree is essential to the health of the natural gas industry. * * * [T]he Natural Gas Act permits the relations between the parties to be established initially by contract, the protection of the public interest being afforded by supervision of the individual contracts, which to that end must be filed with the Commission and made public. * * * Admittedly, the Act presumes a capacity in natural gas companies to make rates and contracts and to change them from time to time, but nowhere in the Act, is either power defined. The obvious implication is that, except as specifically limited by the Act, the rate-making powers of natural gas companies were to be no different from those they would possess in the absence of the act." 350 U. S. at 339, 343, 344, 345. See also *United Gas Pipe Line Co.* v. *Memphis Light, Gas and Water Division*, 1958, ... U. S. ....., ... S. Ct. ....., 3 L. Ed. 2d 153.

VI.

Both expressed in the briefs of the Commission, and unexpressed but implicit in the Court's opinion, is the apprehension that administrative regulation would be thwarted if parties can prescribe the term (i.e., quantity) of the contract. Assuming that this is for us, rather than the Congress, there are at least three answers. First, we are not here dealing with purported contracts of short and artificial duration. All of the contracts were for the substantial term of 10 years. History has proved that they were genuine and were applied in good faith. Second, the new contracts are likewise of substantial duration. Even more so, because their terms are 20 years. This means that the "new" contracts are substantially different. They are not, as claimed, for the same service but only at a different price. One committing himself for two decades instead of 10 years not only to make the

sales but to automatically submit himself to extensive Commission regulation during that period has done much more than simply renew a prior engagement. Third, there are now sufficient administrative tools to prevent any abuse of the accepted purpose of the Act through the spurious device of artificially short contract terms, or any other means by which parties attempt to create the appearance of a firm contract, but which is in fact but a paper transaction.

On the latter the Commission may grant a certificate of limited duration. *Sunray Mid-Continent Oil Co.* v. *FPC*, 10 Cir., 1956, 239 F. 2d 97, reversed per curiam 353 U. S. 944, 77 S. Ct. 792, 1 L. Ed. 2d 794. Conversely, it may grant them without limitation. As a condition to granting the initial Certificate, the Commission can determine whether the proffered contract is genuine and binding for a substantial period of time. If it thinks it not, it may decline the issuance of the Certificate. If, as these cases present, a "new" Certificate is requested for the "new" contract, the Commission can again look at it. Unless the proposed contract subjects the producer to substantial obligations permitting effective regulation for the future, the Commission may decline the Certificate.

All it may not do is force a producer either to produce *more* gas, or sell *more* gas, or sell *more* gas for a longer time. If that is to occur after the expiration of the initial contract, it may be done only upon application of the parties pursuant to a new agreement. The Commission still has the last check since the condition for the grant of the new Certificate may be alteration in the terms of the agreement.

VII.

Finally, all of this has come about with no hearing, with no opportunity for hearing, and with an absolute refusal of the Commission even to receive the various applications for the purpose of a hearing. Section 7(e)

prescribes a hearing to determine whether a Certificate should be issued and whether, and to what extent, special conditions ought to be imposed on the grant. Section 7(c) requires that a hearing be held. Whether, and to what extent, the initial contracts were genuine, and whether, and to what extent, the "new" contracts were merely a continuation or something substantially different, involved at least questions of judgment which could not be foreclosed peremptorily by slamming the door shut before it was scarcely opened. *Northeastern Gas Transmission Co. v. FPC*, 3 Cir., 1952, 195 F. 2d 872, cert. denied 344 U. S. 818, S.Ct. , 97 L. Ed. 637; *Mississippi River Fuel Corp. v. FPC*, 3 Cir., 1953, 202 F. 2d 899; *Cities Service Gas Co. v. FPC*, 10 Cir., 1958, 255 F. 2d 860. The Administrative Procedure Act, 5 USCA §§ 1001-1011, applicable to the Federal Power Commission, *State Corporation Commission of Kansas v. FPC*, 8 Cir., 1953, 206 F. 2d 690, likewise assures a hearing. *Wong Yang Sung v. McGrath*, 1950, 339 U. S. 33, S. Ct. , 94 L. Ed. 616; *Riss & Co. v. United States*, W. D. Mo., 1950, 96 F. Supp. 452, rev'd, 1951, 341 U. S. 907, S. Ct. , 95 L. Ed. 1345.

The peremptory nature of the Commission proceedings which we approve is dramatically demonstrated by the Court's reference to the producer's contentions under 7(b). To the argument of the producer that "it engages in no service and renders no service, that it does not propose to abandon any facilities, that it has no facilities subject to the Commission's jurisdiction and hence it is not subject to Section 7(b) of the Act * * *," the Court holds "our decision in *Continental Oil Company v. Federal Power Commission*, F. 2d , decided this day, is controlling on this issue." Accepting, for the moment, the correctness of our decision in *Continental Oil Company*, that decision deals at length with minute facts concerning a specific well which was the subject of an extensive hearing. In this proceeding, without hearing, without evidence, without knowing whether, in the sense of *Con-*

tinental Oil Company, there is any "facility" by which the service is performed, this Court proceeds to declare that the Commission could take similar action.

The joint effect of these opinions today announced is to destroy the last remnant of the § 1(b) production and gathering exclusion. By forcing the owner of a natural resource to continue deliveries until the reservoir is exhausted, and to continue the delivery of gas if some piece of equipment effectuates the sale or its containment at the point of delivery, inevitably means that production is in the hands of the Commission. Congress has posted this as off limits to the Commission. Only Congress may make the change.

I therefore respectfully dissent.

A true copy
Test: [s] EDWARD W. WADSWORTH
Edward W. Wadsworth
Clerk, U. S. Court of Appeals, Fifth Circuit
New Orleans, Louisiana
Aug 3, 1959

Judgment

Extract from the Minutes of April 17, 1959

No. 17256

HUNT OIL COMPANY,

VERSUS

FEDERAL POWER COMMISSION.

This cause came on to be heard on the petition of Hunt Oil Company for review of orders of the Federal Power Commission issued on February 6, 1958 in Docket No. G-14229, on February 7, 1958 in Docket No. G-14408, and on April 2, 1958 in Docket Nos. G-14229 and 14408, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered, adjudged and decreed by this Court that the orders of the Commission in this cause be, and the same are hereby, affirmed.

"BROWN, Circuit Judge, dissenting."

APPENDIX B

Excerpts from the Constitution of the United States Amendment V—Capital Crimes: Due Process

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. (U. S. Code Annotated, Constitution, Amendments 1 to 13, P. 102).

Excerpts from the Natural Gas Act

RATES AND CHARGES; SCHEDULES; SUSPENSION OF NEW RATES

SEC. 4.

* * * * * * * * * * *

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulations, or contract relating thereto, except after thirty

days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, or State commission, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect: *Provided*, That the Commission shall not have authority to suspend the rate, charge, classification, or service for the sale of natural gas for resale for industrial use only; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification,

or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible. [52 Stat. 822 (1938); 15 U. S. C. § 717c]

FIXING RATE AND CHARGES; DETERMINATION OF COST OF PRODUCTION OR TRANSPORTATION

SEC. 5. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however*, That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural-

gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural-gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

* * * * * * * * * * *

EXTENSION OF FACILITIES; ABANDONMENT OF SERVICE

SEC. 7.

* * * * * * * * * * *

(b) No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment. [52 Stat. 824 (1938); 15 U. S. C. § 717f(b)]

(c) [1] No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however,* That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale

[1] Subsection 7(c) was amended February 7, 1942 by Public Law No. 444, 77th Congress, Chapter 49, 2d Session [H. R. 5249], 56 Stat. 83.

of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after the effective date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however*, That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest. [52 Stat. 825 (1938), as amended, 56 Stat. 83 (1942); 15 U. S. C. § 717f(c)] [2]

* * * * * * * * * * *

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[2] As originally enacted June 21, 1938 by Public Law No. 688, 75th Congress, Chapter 556, 3d Session [H. R. 6586], 52 Stat. 825, Section 7(c) read as follows:

"(c) No natural-gas company shall undertake the construction or extension of any facilities for the transportation of natural gas to a market in which natural gas is already being served by another natural-gas company, or acquire or operate

(e)[4] Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized

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any such facilities or extensions thereof, or engage in transportation by means of any new or additional facilities, or sell natural gas in any such market, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require such new construction or operation of any such facilities or extensions thereof: *Provided, however*, That a natural-gas company already serving a market may enlarge or extend its facilities for the purpose of supplying increased market demands in the territory in which it operates. Whenever any natural-gas company shall make application for a certificate of convenience and necessity under the provisions of this subsection, the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission. In passing on applications for certificates of convenience and necessity, the Commission shall give due consideration to the applicant's ability to render and maintain adequate service at rates lower than those prevailing in the territory to be served, it being the intention of Congress that natural gas shall be sold in interstate commerce for resale for ultimate public consumption for domestic, commercial, industrial, or any other use at the lowest possible reasonable rate consistent with the maintenance of adequate service in the public interest." (52 Stat. 825 (1938)).

[4] Subsection 7(e) was added February 7, 1942 by Public Law No. 444, 77th Congress, Chapter 49, 2d Session [H. R. 5249], 56 Stat. 83, 84.

by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require. [56 Stat. 84 (1942); 15 U. S. C. § 717f(e)]

* * * * * * * * * *

REHEARING; COURT REVIEW OF ORDERS

SEC. 19.

* * * * * * * * * *

(b) Any party to a proceeding under this act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States[8] for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon any member of the Commission and thereupon the Commission shall certify and file with the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable

[8] Circuit Court of Appeals of the United States was redesignated as "United States Court of Appeals" by Act of June 25, 1948, 62 Stat. 870.

ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

* * * * * * * * * * *

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 323

HUNT OIL COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

OPINIONS BELOW

The letter order of the Federal Power Commission, dated February 6, 1958 (R. 217-219), is not reported. The Commission's order issued February 7, 1958 (R. 219-222), is not reported. The Commission's order denying reconsideration, issued April 2, 1958 (R. 244-248), is reported at 19 F.P.C. 446. The opinions of the Court of Appeals (Pet. App. 1a-2a) are reported at 266 F.2d 232.

JURISDICTION

The judgment of the Court of Appeals was entered on April 17, 1959 (Pet. App. 23a). A petition for rehearing, timely filed, was denied on June 3, 1959. The petition for a writ of certiorari was filed on August 19, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r (b).

QUESTIONS PRESENTED

A producer of natural gas was granted by the Federal Power Commission a certificate of public convenience and necessity to supply gas to an interstate pipeline, and to operate facilities for that sale, without any condition limiting the certificate to the term of his contract with the pipeline (10 years). The producer also filed the contract as its rate schedule pursuant to the Commission's rules. The questions presented are:

1. Does the expiration or cancellation of the contract terminate the producer's certificate and obligation to supply gas to the pipeline?

2. Does the producer's subsequent execution of a new contract with the same pipeline for the same gas supply for a further period of years, but at a higher price, constitute a different "operation, sale, [or] service" for which a new certificate should be issued and an initial rate-filing made; or is the new higher rate a "change" in rate which is subject to a hearing under, and the procedures of, Section 4 of the Natural Gas Act?

3. In these circumstances, may the Commission without hearing reject the producer's application for a new certificate where it permits the producer to file its new contract as a "change" in rate for the sale covered by the previously issued certificate? [1]

STATUTES INVOLVED

The applicable provisions of the Natural Gas Act are set forth in petitioner's appendix at pp. 24a-31a.

STATEMENT

Petitioner, an independent producer of natural gas, sells gas from certain unitized leases in Gwinville Gas Field in Mississippi to Southern Natural Gas Company. The sale was commenced under a contract (R. 40) entered into on June 30, 1948, for a term of ten years from the date of first delivery (R. 63, 67). The contract price was 7½¢ per Mcf for the first five years and 8¢ for the next five (R. 60).

In October 1954, petitioner filed the contract with the Federal Power Commission as its FPC Gas Rate Schedule No. 6 (R. 40), pursuant to this Court's decision in *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672, and the Commission's No. 174 series of orders (18 C.F.R. (1958 Cum. Supp.) 154.91, *et seq.*)

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[1] If certiorari should be granted, we reserve the right also to argue, as we did in the court below, that petitioner was not entitled to immediate review of the order of the Commission setting for hearing and suspending the rate schedules which had been filed as rate changes because that order was procedural and interlocutory.

implementing that decision. On February 7, 1956, the Commission issued a certificate of public convenience and necessity authorizing the sale of natural gas to Southern (R. 154).

On January 10, 1958, petitioner filed a certificate application seeking authorization for service to Southern based on a new contract dated December 23, 1957, which was to be effective December 1, 1957, terminating on that date the old contract which would have expired on June 30, 1958 (R. 163, 190, 198, 203). At the same time, petitioner tendered for filing the new contract as an "initial" rate schedule (R. 162). The new contract merely continued the service already supplied to Southern from the same field and reservoirs, but at the rate of 20¢ per Mcf (R. 183). On the same date, petitioner also filed the new contract alternatively and under protest, as a rate change (R. 202). Petitioner did not apply for approval of abandonment of the sale under Section 7(b) of the Natural Gas Act at any time.

The Commission rejected the certificate application on February 6, 1958, because, as its letter to petitioner explained, the certificate would have duplicated the previously issued and still effective certificate, and the Commission accepted the proposed rate schedule only as a notice of change in petitioner's effective rate (R. 217). On February 7, 1958, the proposed rate change was suspended and set for hearing (R. 219). Thereafter, petitioner applied for rehearing and reconsideration (R. 223). On April 2, 1958, the Commission denied reconsideration, reiterating its previous explanation (R. 244).

The court below, with Judge Brown dissenting, held that the same principles were applicable to this case as those upon which its decision was based in *Sun Oil Company* v. *F.P.C.*, 266 F.2d 222 (Pet. App. 3a), pending on petition for certiorari, No. 321, this Term (Pet. App. 1a). It affirmed the Commission's orders for the reasons set forth in the *Sun* case (Pet. App. 2a, 5a-10a).

ARGUMENT

This petitioner advances essentially the same arguments made by the petitioner in *S.W. Richardson* v. *Federal Power Commission*, No. 208, this Term, seeking review of a companion decision of the court below on a record parallel to the present one. The Fifth Circuit's opinion in *Richardson* (266 F.2d 233), as here, referred to the opinion in *Sun*, *supra*, another companion case decided the same day, for the basis of its decision. For the reasons stated at pp. 5-10 of our brief in opposition in *Richardson*, to

which we respectfully refer the Court, we submit that this petition should likewise be denied.[2]

Respectfully submitted,

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Federal Power Commission.

SEPTEMBER 1959.

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[2] Richardson's contention that the Section 7(b) prohibition of abandonment without Commission approval does not apply to him because his sale is not made by means of facilities subject to Commission jurisdiction, which is discussed at pp. 10-12 of our brief in opposition in *Richardson*, is not involved in the present case.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 323

HUNT OIL COMPANY, *Petitioner*,

v.

FEDERAL POWER COMMISSION, *Respondent*.

REPLY BRIEF OF PETITIONER HUNT OIL COMPANY

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HUNT OIL COMPANY, *Petitioner*,

v.

FEDERAL POWER COMMISSION, *Respondent*.

REPLY BRIEF OF PETITIONER HUNT OIL COMPANY

Pursuant to Rule 24(4) of this Honorable Court, Petitioner, Hunt Oil Company, submits its Reply Brief to the Brief for the Federal Power Commission (Respondent) in Opposition.

PRELIMINARY STATEMENT

In its Brief in Opposition Respondent asks this Honorable Court to deny the Petition for a Writ of Certiorari for the reasons set forth in the Brief in Opposition in Cause No. 208, October Term, 1959, *S. W. Richardson*, Petitioner v. *Federal Power Commission*. Petitioner will therefore refer to that Brief.

QUESTIONS PRESENTED AND ARGUMENT

The Petition in this proceeding, in Petitioner's view, raises a more fundamental and basic question than the questions listed by Respondent (Brief in Opp., p. 2). This question is whether this Honorable Court's *Phillips* decision,[1] holding the Natural Gas Act applicable to Independent Producers, and Petitioner's compliance with Sections 4 and 7 of the Natural Gas Act, relating to a sale of natural gas for a period of fixed duration undertaken prior to the date of that decision, constitutes an unlimited dedication of gas reserves to a purchaser which had only obligated itself to purchase gas for the contract term (Pet., pp. 2, 7-14). If the orders under review are sustained, Respondent will be permitted to nullify the duration terms of gas sales agreements without compliance with statutory procedural requirements. Additionally, Respondent will be defeating by administrative action, without notice and opportunity for hearing, one of the basic purposes of the Natural Gas Act, as pointed out by this Court in its *Memphis*[2] and *Mobile*[3] decisions, namely, that the Act " * * * evinces no purpose to abrogate private contracts as such."[4] With some 6,897 contract rate schedules in effect as of June 7, 1954, of which Petitioner believes a very high percentage are of fixed duration, the basic question presented is of utmost importance to the natural gas industry, and the Petition, it is respectfully urged,

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[1] *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672.

[2] *United Gas Pipe Line Co.* v. *Memphis Gas, Light and Water Division*, —— U.S. ——, 3 L. ed. 153, 159 (Ad. Sheets).

[3] *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332.

[4] Ibid., 350 U.S. at 338.

should not be regarded as one dealing with the validity of Respondent's regulatory action with respect to isolated sales as the listed "Questions Presented" in Respondent's Brief might suggest and as Respondent argues.[5]

With respect to the certificate requirements of Sections 7(c) and 7(e) of the Natural Gas Act and Petitioner's compliance with the requirements thereof, the basic question is whether Petitioner by applying only for a certificate to complete a sale pursuant to a contract of fixed duration and being granted a certificate " * * * authorizing the sale * * * as more fully described in the application * * * " was granted certificate authority to have a term coextensive with the term of the contract or certificate authority of unlimited duration which committed without limitation, and contrary to the specific terms of the contract, Petitioner's gas reserves from the field involved (Pet. pp. 7-11; R. 85, 92-93, 122, 158-159). Petitioner does not contend as suggested by Respondent's first question that the termination or cancellation of the contract terminates Petitioner's certificate authority. The duration of that authority, as already set forth above, is determined from the language of the certificate. Respondent's Brief in Opposition[6] makes no reference to the foregoing limiting language of the certificate, to the requirements of Section 7(e) of the Act, that upon making the requisite statutory showings, Respondent shall issue *the certificate requested*, and to Respondent's only statutory authority to alter the proposal in the certificate application by conditions

[5] See Brief in Opposition, *S. W. Richardson* v. *F.P.C.*, No. 208, October Term, 1959, pp. 2, 5.

[6] Ibid., pp. 2, 6-9.

which Respondent did not exercise as to the duration of the sale (Pet. 7-10). Moreover, as of the date the certificate was issued, Petitioner did not and could not show ability to continue the sale after the term of the initial contract as Petitioner had no purchaser for its gas (R. 154, 40-68, 162-212).

The basic question presented by Petitioner with respect to Section 4 of the Act is whether, after a contract filed as a rate schedule has expired by its own terms, is a second contract applicable to a new and wholly unrelated sale from the same field, filed as a new rate schedule, a "change" in the first contract rate schedule. Respondent's contentions that this question should be answered in the affirmative appear to be based on the assumption that the second contract continued the first sale, and that the filing of the first contract as a rate schedule automatically committed Petitioner to continue the sale indefinitely.[7] Respondent's assumption is contrary to the terms of the contracts (R. 40-68, 162-212). For the reasons set forth in the Petition, it is respectfully submitted that the filing of the first contract does not have this effect (Pet. pp. 11-14).

The cases cited[8] by Respondent clearly do not support its contentions. This Court's recital of the facts in *Pennsylvania Water & Power Co.* v. *F.P.C.*, 343 U.S. 414, 422-3, disclose that Respondent ordered continuance of a "practice" pursuant to Section 206 of the Federal Power Act, a section substantially identical to Section 5(a) of the Natural Gas Act. Assuming *arguendo* Section 5(a) would be applicable

[7] Ibid., pp. 2, 4, 5, 6.

[8] Ibid., pp. 6-8.

to the term of a contract rate schedule, for this decision to support Respondent's contention, Respondent would have had to order, after notice and opportunity for hearing and after making requisite findings, pursuant to the authority accorded it by Section 5(a) of the Act, that the fixed term of Petitioner's contract rate schedule be changed to a term of unlimited duration. (Pet. p. 12). The *Bel Oil*,[9] *Mississippi*[10] and *Cities Service*[11] cases cited by Respondent involved changes in contract rate schedules during the effective terms thereof as contracts and rate schedules, and clearly they are not precedents for the proposition that a new and wholly unrelated contract should be considered as a change in another contract previously filed as a rate schedule after its expiration date. Under the Commission's suspension order issued February 7, 1958, the new contract could have no effectiveness during the term of the initial contract as a rate schedule. (R. 219, 222)

The *Huber* case,[12] in essence, involved the unwillingness of an Independent Producer to apply for, and discharge, certificate authority to continue a sale pursuant to a contract negotiated prior to this Court's *Phillips* decision, *supra*. As of the date Petitioner's initial contract expired, Petitioner had not only applied for a certificate to carry out its undertaking, but had

[9] *Bel Oil Corp.* v. *F.P.C.*, 255 F. 2d 548, *cert. den.* 358 U.S. 804.

[10] *Mississippi Power & Light Co.* v. *Memphis Natural Gas Co.* 162 F. 2d 388, *cert. den.* 332 U.S. 770.

[11] *Cities Service Gas Producing Co.* v. *F.P.C.*, 233 F. 2d 726, *cert. den.* 352 U.S. 911.

[12] *J. M. Huber Corp.* v. *F.P.C.*, 236 F. 2d 550, *cert. den.* 352 U.S. 971.

discharged its obligation under the contract and the certificate, and the contract, as such, and as a rate schedule had also expired under its own terms. Similarly, as of that date, no abandonment authority was required as the "sale" for which Petitioner sought and was granted certificate authority had been completed. Here, unlike the first *Sunray case*,[13] Petitioner applied for certificate authority to complete the sale undertaken by its initial contract and was granted authority only to complete that sale.

For all the foregoing reasons and the reasons set forth in its Petition, Petitioner respectfully prays that its Petition be granted.

Respectfully submitted,

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By OMAR L. CROOK

[13] *Sunray Mid-Continent Oil Co.* v. *F.P.C.*, 239 F. 2d 97 reversed in part and remanded 353 U.S. 944.

Certificate of Service

I certify that the Reply Brief of Petitioner, Hunt Oil Company, was served upon Respondent, the Federal Power Commission, by mailing a copy thereof, postage prepaid, to each of the following attorneys for Respondent on the 5th day of October, 1959.

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